No. 2029

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC LIVE STOCK COMPANY (a corporation),

Appellant,

vs.

SILVIES RIVER IRRIGATION COMPANY (a corporation) and HARNEY VALLEY IMPROVEMENT COMPANY (a corporation),

Appellees.

PETITION OF APPELLANT FOR REHEARING.

WIRT MINOR,
EDWARD F. TREADWELL,
Solicitors for Appellant and Petitioner.

Filed this.....day of November, 1912.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The Pacific Live Stock Company (a corporation), the appellant in the above entitled cause, hereby respectfully petitions for a rehearing of said cause for the reasons set forth in this petition.

Reducing this case to its simplest form, it appears that the Pacific Live Stock Company, being the owner of a large amount of land riparian to Silvies river, brought this suit against the defendants to enjoin a threatened diversion of a large quantity of the waters of the river. The complaint alleged a great benefit of the water of the river to said land, and the irrigation of the land thereby, and the production of valuable crops thereon.

The defendant claimed no right to the water of the stream except as an intended appropriator thereof, and claimed that it could appropriate the water without in any way injuring the complainant.

The case was tried and the court entered a decree in which the court expressly found the ownership of the land, the irrigation thereof, that

> "ALL of the water of Silvies river is necessary for the irrigation of complainant's land and the lands of others irrigated from the waters of said river as above described and which are annually irrigated by the waters of said river if undisturbed, and by the diversion contemplated by the defendants of the water of Silvies river the complainant and others owning lands irrigated from said river as above described will be deprived of valuable feed and crops, their lands rendered less valuable *and the complainant will be greatly damaged and injured.*
>
> "Unless the defendants be enjoined from perfecting their diversion and taking the waters of said river they will continue the construction and maintenance of their ditch and by means thereof will divert waters of said river and will carry the same to and use the same upon non-riparian lands not now naturally irrigated by the waters of said river through said ditch and deprive the complainant and

> others owning lands naturally irrigated from said stream of the use and enjoyment of the waters of said stream, *and such diversion of the waters of said river by defendants and the deprivation of the complainant of the use and enjoyment of said rivers will cause great and irreparable damage and injury to the complainant.*"

The court thereupon entered a decree entirely enjoining the defendants from diverting the water. That part of the decree being in favor of the complainant, complainant naturally could not appeal therefrom, and so far as the defendants were concerned, they have not appealed from the decree, nor have they in any way questioned the correctness of the findings of the court on this subject. Under the well-settled rule of this court, no finding can be reviewed on appeal unless it is properly attacked by specification, and in passing on an appeal the court is bound to accept as final any finding, either express or implied, which is not attacked by specification. It therefore results that so far as this court is concerned, it has before it a decree containing an express finding that all of the water of this river is necessary for the complainant; that it is highly beneficial to it, and that to deprive the complainant of the water would cause it great and irreparable damage. But not only has the court given such a decree, but it is perfectly obvious that if the trial court had refused to give such a decree and the complainant had appealed, this court necessarily would have been compelled to reverse the decree if the facts were as found by the court herein.

THE CASE OF EASTERN OREGON LAND CO. V. WILLOW RIVER LAND AND IRRIGATION CO.

This can not be more aptly shown than by the decision of this court in the case of *Eastern Oregon Land Co. v. Willow River Land & Irrigation Company,* which was decided upon the same day that the case at bar was decided by this court. That case was tried before the same judge who tried the case at bar, and from the evidence in that case he held that the complainant did not need the water, and that it would not be injured by the diversion thereof by the defendant. On appeal, this court laid down the rule that it was well settled by the decisions of the Supreme Court of Oregon that a riparian owner was entitled to the full natural flow of the stream, so far as it was beneficial to his land, and that this was true of the ordinary flood waters as well as the waters at the lower stages of the stream, and Mr. Justice Ross in his concurring opinion in that case also admitted that under the law of the State of Oregon the riparian owner was entitled to the flow of the stream so far as it was beneficial to him.

The court thereupon examined the evidence and from the evidence found that the flow of the stream in that case was beneficial to the complainant, and that to deprive the complainant of the water would injure it, and thereupon reversed the decision of the trial judge. Certainly the determination of this court in that case from the evidence that the water was beneficial to the complainant and its diversion would cause it injury can be no stronger than the findings in this case to the effect that all of the water is necessary to the com-

plainant, that by it valuable crops are produced and that to deprive it of the water would cause great and irreparable injury. It necessarily results that whether the trial court did or did not give the complainant an injunction upon these findings the complainant was absolutely entitled to such an injunction under the rules of law well settled in the State of Oregon, and admitted by this court to exist in the case last above cited, and certainly the complainant here should not be placed in a worse position when the trial court granted it the injunction than it would have been if the injunction had been refused.

Surplus Water.

So far as the complainant was concerned, all that it had to show in order to be entitled to the injunction prayed for was that this water, either as it naturally overflowed the land or as it was made to artificially overflow the land, was beneficial to the complainant, but it appears from the answer of the defendants that they attempted to interject into the case an additional feature, namely: that there was in the stream surplus water or more water than was necessary to irrigate the complainant's land, and the lands of others on the stream. The court can readily see that in one sense this might be true, and still the right of the complainant to an injunction in no way be affected. In other words, it might be shown that this stream naturally and artificially overflowed the lands of the complainant and other persons, and that if the defendants took out the water they claimed it would no longer overflow those

lands and the lands would thus be destroyed. At the same time it might be true that if all the people on this river would construct expensive irrigation works, such as reservoirs, diverting works, canals, etc., and then apply the very highest duty to the water, it might be made to irrigate more land than was actually irrigated. But it must be obvious that such a surplus as that would not disentitle the complainant to an injunction. In other words, assuming that the river when flowing at a certain stage will naturally overflow the lands of the complainant, and will thus naturally irrigate and benefit the lands, whereas one-half of that water would irrigate them providing the complainant constructed expensive diverting works and canals, to hold that it should be deprived of its natural advantage for that reason would be directly contrary to the rule laid down in the case above referred to, that the riparian owner is entitled to the natural flow of the stream so long as it is beneficial to him.

In other words, the only ultimate question of any importance in any case brought by a riparian owner to enjoin a threatened diversion by a trespasser is this: Is the water beneficial to the complainant, and will he be damaged if it is taken away? An affirmative answer such as was given in this case to that question necessarily determines the case and entitles the complainant to the injunction prayed for.

But while we were certain of this position, we very properly joined issue with the defendants on the issue they attempted to raise, and the evidence introduced

was applicable of course not only to the real issue in the case, but to the peculiar issue raised by the defendants. On that issue the court filed its opinion in which it said:

> "The defendants claim the right to take the surplus water only and disclaim any intention of interfering with the rights of any of the settlers; *but it is not shown that there is any surplus water.* The evidence in this case tends strongly to support the complainant's position that all of the water is necessary for the irrigation of the land in private holdings and which is annually irrigated by the overflow if undisturbed."

In view of the express finding of the court that all the water is necessary to the irrigation of complainant's land, and that complainant will be irreparably injured without the water, even if in any other sense there could be surplus water, the burden was certainly upon the defendants to establish that fact, and when the trial court finds that it is not shown that there is any surplus water, it necessarily, from a legal standpoint, so far as this particular case is concerned, decides that there is no surplus water. In other words, a case in court is to be tried by the evidence introduced. If the defendants failed to prove their case, that is no fault of the complainant, and it is no fault of the trial court or of this court, and when the court expressly found that all the water of the river is necessary for the irrigation of the lands irrigated, it necessarily found that it was not shown that there was any surplus water, and therefore from a legal standpoint, so far as this case is concerned, that there was no surplus water.

The Record.

The court having expressly found that all the water was necessary to the complainant, and that to divert it would cause it great and irreparable injury, the complainant properly took the position on this appeal that it was useless to bring up the evidence on those two issues. Clearly the complainant could not attack the findings on those issues because the findings were in its favor. The defendants could not attack those findings because they had not in any way filed assignments directed against them.

It would have been equally absurd for the complainant to have appealed from the portion of the judgment which enjoined and properly enjoined the defendant from diverting water which the court found was necessary for the irrigation of the complainant's land, and the diversion of which the court found would cause the complainant great and irreparable injury. The complainant therefore simply appealed from the portion of the judgment which in effect provided that if in some other proceeding and in some other tribunal, and upon other evidence, it should be determined that there was a surplus of water which could be diverted without injury to complainant, then the defendants might apply for a vacation of the injunction.

The lower court also properly determined that on such appeal the only question was one of law, whether or not under the facts found this was a proper provision to insert in the decree, and the court thereupon provided that the record on the appeal should consist

simply of the pleadings, final decree and appeal papers (Record, p. 41).

The question, therefore, presented on this appeal is simply this: In a case where the lower court has made findings which not only sustain an injunction but which absolutely require its entry as decided by this court in the Eastern Oregon Land Company case, and the findings upon which that injunction is based are in no way questioned or open to review, and where there is no appeal whatever from the judgment granting the injunction, is it proper for the court to give leave to the parties to re-open the case if some other tribunal on other evidence shall find to the contrary to the facts found by the court? If it is not proper then that part of the judgment should be reversed, but *such reversal should in no way affect the injunction which has already been entered and properly entered upon the findings in the case.*

JUDGMENT HEREIN REVERSES THE JUDGMENT NOT APPEALED FROM.

The jurisdiction of this court is entirely appellate, and this court has no jurisdiction to in any way interfere with a judgment which has not been properly appealed from to this court. The judgment in favor of the complainant in this case enjoining the defendants from diverting this water, and necessarily containing an adjudication that the defendants under the evidence in the case were not entitled to divert the same, has

never been appealed from by either party to this court. Nor have the findings upon which it is based ever been attacked by any party in the lower court or in this court. The only appeal in this case is from an independent provision in the decree which goes on this theory: The trial court decides that from the evidence all the water is necessary for the complainant, and that to divert it or any part of it would cause the complainant great and irreparable injury. The court, therefore, properly enjoins the same, but anticipating that at some future time in some future proceeding in some other tribunal it may be determined that the facts are otherwise, it grants leave to the defendant to apply for a vacation of the injunction in that event. That part of the judgment in no way weakens the determination of the court of the propriety of the injunction under the facts as found by the court. It simply reserves to the defendants the right to apply to the court for a vacation of it under new circumstances. If that is proper to be done, then that part of the judgment should be affirmed. On the contrary, if, as we argue, it is improper to reserve any such right to the defendants, then that part of the judgment should simply be reversed as being a matter which never should have entered into the judgment in any way.

But, as a matter of fact, this court in its judgment has reversed the "judgment" without limiting its reversal to the part of the judgment appealed from and remands the cause

> "with directions to allow the parties a reasonable time to take proceedings under the above mentioned

> statute of the State of Oregon, and in the event they do not proceed therein within a reasonable time to require all parties in interest to interplead herein and then to proceed to a determination of the issues between them in accordance with the laws of the said state".

This necessarily involves these matters: *First.* A judgment is apparently reversed in its entirety when only a part of the judgment has been appealed from. *Second.* A judgment is reversed which is based on findings supporting and requiring its entry, although the judgment is not appealed from, nor are those findings attacked by specification, or otherwise. *Third.* It allows the parties who are already impleaded in this court and entitled to have their rights determined therein to transfer the subject matter of the litigation to a state tribunal; and, *Fourth.* It requires the court, although the case has been tried and findings of the court made and a judgment entered, which are not attacked in any way, to bring in all parties interested in the water of Silvies river, and then to proceed to a determination of any issues which may be raised between them.

It seems to us that this is not only an improper disposition of this appeal, but one entirely beyond the jurisdiction of the court. As we have said, this court can not reverse a judgment which has not been appealed from. If the court holds that the part of the judgment appealed from is not separable from the rest of the judgment it necessarily results that our appeal was futile and abortive, and should either be dismissed

or the part of the judgment appealed from affirmed. But that it is separable is perfectly clear, for it assumes the propriety of the judgment enjoining the defendants but simply grants to the defendants a permission under certain circumstances to move to vacate the same, and the sole question therefore is not the propriety of the judgment of injunction but the propriety of the reservation of this right to the defendants, which is clearly a separable proposition.

STATUTE OF 1909.

So far as the portion of the decree relates to the permission given to the parties by this court to proceed under the Oregon statute of 1909, it appears that this case was commenced on the 29th day of March, 1908, or about a year before the passage of the statute in question. The complainant being a non-resident of the state was entitled to invoke the jurisdiction of the federal court to enjoin this threatened invasion of its rights. It invoked that jurisdiction and tried its case in the ordinary way, and is entitled to a judgment upon that submission. This court certainly can not mean to decide that the jurisdiction of the federal court is in any way affected by the statute of Oregon providing a certain special state tribunal to adjudicate water rights, and the federal courts can not abdicate their jurisdiction nor deprive a non-resident of the right to have a decree entered protecting its rights against invasion. This court directs the lower court to allow

the parties to take proceedings under the state statute. It does not say that all of the parties to this suit are to join in such a proceeding, or whether it would satisfy the requirements of this court if the defendants, for instance, should initiate such proceeding and bring the complainant in as an adverse party thereto. If such is the meaning of the judgment of this court, then the jurisdiction of this court would be ousted by a subsequent proceeding brought by one of the parties litigant against the other party litigant involving the same subject matter, a condition of things that certainly never could have been contemplated.

The court certainly can not assume that the complainant in this case, after having at great expense tried this case and obtained a favorable finding and decree enjoining this infringement of its right, will voluntarily submit itself to any other tribunal, and if the judgment of this court in this particular means that the court is to allow all of the parties by agreement to inaugurate proceedings under the state statute, it might be harmless, but it certainly should not be left in its present uncertain condition.

Assuming that this is its meaning and that the parties do not avail themselves of the privilege accorded them, then instead of directing the trial court to enter the judgment which is proper to be entered under the evidence taken the court not only wipes out the present judgment and the present findings supporting it, but also wipes out all the proceedings in the case and requires that hundreds of new parties be brought into the

case and then the case proceeded with *de novo*. It is difficult to see any authority for the reversal of a judgment on the ground that other persons were proper parties to the suit where no plea of any kind has ever been interposed to the non-joinder of such parties, and no application has been made in the lower court for the bringing in of additional parties, and where no appeal has been taken from the judgment by the only party who could complain of the judgment. Of course, no one would say for a moment that in case a riparian owner is threatened with invasion by having his water taken away from him that before he can enjoin the use he must join as parties every one interested in the waters of the stream. Such a rule would not only be entirely impracticable, but it is entirely contrary to numerous decisions of the courts, and contrary to every principle of law. The right of the riparian owner is part of his land itself and he is entitled to protect that right against a trespasser, and under numerous decisions of every court in which the matter has arisen it has been uniformly held that he may maintain an action alone to enjoin such diversion. Not only that, but the complainant in this case could only maintain this suit where proper diversity of citzenship existed. Such diversity may not exist between the complainant and other users of the water. It is not likely that all parties in interest would voluntarily join with the complainant as parties complainant, as much of the land irrigated from this river is far above the point of diversion of the defendants, and there is no reason for the court to believe that they could be made parties defend-

ant. In fact it is difficult to see on what basis the complainant could justify the joining of these parties as defendants. They have not infringed the rights of the complainant. The complainant simply has certain rights and takes the position, which it has a right to take, that those rights are being interfered with by the defendants. It could not bring such a suit against people who had not interfered with its rights, and it certainly should not be compelled by the court to force people into court who are not interfering with its rights, and with whom it has no dispute.

We take it for granted, therefore, that this court can hardly mean that the lower court can in any way compel the complainant to bring these parties in as defendants or as plaintiffs. The only way, therefore, that they could be brought in would be by cross-bills filed by the defendants, but in that event the defendant would be turning the action into one to determine the rights of other parties which would be entirely immaterial to the suit, since if defendants are interfering with our rights they should be enjoined, irrespective of the rights of other parties.

We would have been glad to have the presence of all other owners on this river to oppose the invasion made by the defendants, but we know of no way in which we could bring them in, unless we allege that they were invading our rights and we are not in a position to allege anything of the kind. But if their presence was of any benefit to the defendants they should have brought them in before the case was tried and went to

judgment, and it is too late, we submit, after the case has gone to judgment and that judgment has not been questioned by the defendants, for them to ask this court to bring in new parties. In fact, they have not even had the hardihood to ask for anything of the kind, but the permission is one which has been granted to them by this court without any appeal on their part.

ACT OF 1909 DOES NOT AFFECT PENDING SUITS.

It is provided by section 1, subdivision 4 of the Water Act (Lord's Oregon Laws, section 6595) as follows:

> "4. Nor shall anything in this act contained affect relative priorities to the use of water between or among parties to any decree of the courts rendered in causes determined *or pending* prior to the taking effect of this act."

It is clear from this that the act did not intend to in any way interfere with the jurisdiction of the state courts so far as pending cases were concerned, and in fact, even without such a provision it has been held that such an act in no way affects the jurisdiction of the state courts over water rights.

> *Crawford Co. v. Hathaway,* 67 Neb. 325, 93 N. W. 781.

It must be equally clear that such an act was not intended to affect pending cases in the federal courts, even if the legislature had power to do so.

The attention of the court should also be called to the fact that it has been held by the United States

District Court of Oregon that proceedings under the state statute referred to are not judicial proceedings at all, but are merely administrative in their character. If that be true, then it would result that the parties to this case are entirely deprived of their right to have their rights determined by a judicial tribunal, and a judicial tribunal abdicates its function in favor of a mere administrative board which has no power to make a judicial determination in the matter.

STIPULATION.

This court in its opinion refers to the fact that the evidence was not brought up on this appeal, but adds

> "There was, however, a stipulation entered into by the respective parties that the evidence contained in the record in the suit of Pacific Live Stock Company v. W. D. Hanley, et al., No. 2036, just disposed of, be considered by the court *on the present appeal*".

The court is in error in this regard. The fact is that in the lower court a stipulation was entered into between the parties that the evidence in the Hanley case might be considered in the lower court in the present case. Assuming that that stipulation was availed of on the trial of this action, the evidence in the Hanley case would then become a part of the evidence in this case, and *in case the evidence had been brought up* that evidence could have been included in the record, but the evidence was not brought up, but the respondent, without any leave of court or any authority of law, files in

this court a stipulation that certain evidence in the Hanley case might be considered evidence in the lower court, and then asks the court to consider the evidence in the Hanley case for the purpose of overthrowing the findings in the case at bar, and the court actually uses it for that purpose, for the court says in its opinion:

> "It sufficiently appears from the evidence in the case of Pacific Live Stock Company vs. W. D. Hanley, No. 2036, just decided which *by the stipulation of the parties is added to the record herein* that in the spring time during the melting of the snows the river brings down from the mountains enormous quantities of flood waters", etc., etc.

As a matter of fact, in the lower court the court had the same evidence before it, and also had the evidence of the complainant, and from that evidence the trial court held that all of this water was not only beneficial to the complainant, but was necessary for the irrigation of its lands. In fact, we may say that in the lower court we proved the actual amount of water which flowed down the river and produced not only the government measurements, as was done in the case of the Eastern Oregon Land Company, but produced the government officials who took those measurements, and thus showed the actual amount of water which came down the river, which entirely overthrew and destroyed the testimony which is contained in the Hanley case, and to which the court refers. We also showed the actual amount of land irrigated by these waters and the actual amount of water necessary to irrigate that land, and the result was that in most years there was an absolute deficiency of water. We also showed that

the land which Hanley called "swamp" was the most valuable and productive land on the ranch and wintered thousands of head of cattle, even with three feet of snow on the ground.

We can see from the decision of the court that the court has fallen into the error of believing that the parties had entered into a stipulation that this testimony in the Hanley case might "be considered by the court *on this appeal*", or that that testimony had by stipulation of the parties been *"added to the record herein"*. Nothing could be further from the fact. The truth of it is that the lower court by its order fixed what the record on this appeal should be, and fixed it correctly, as we understand the law. The appellees took no proceedings before the lower court or before the clerk to see that the record was any different from that ordered by the trial court, and then, without any formal proceeding being taken requiring the entire record to be brought up, they produce, without any authority of law, a stipulation that certain evidence might be deemed evidence in the case in the lower court, and then on account of the fortuitous circumstance that that evidence happens to be in this court in another case, they prevail upon this court to consider it in this case, although the other evidence in the case is not before the court. In other words, they simply bring before this court, without any authority of law, one piece of evidence introduced in the lower court and by that means prevail upon this court to override the findings and judgment of the court below. Of course, if we had stipulated in this court that such a proceeding

might take place, and had stipulated that this particular evidence might be considered as part of the record on this appeal, as assumed by the court, the situation would be entirely different, but we have done nothing of the kind, and to do anything of the kind would have been absolutely absurd in view of the fact that all of the evidence introduced was for the purpose of overcoming the same claim which is attempted to be supported by the testimony of Mr. Hanley.

We have claimed right along, and still claim, that the record made up in this case was made up properly and that no amount of evidence can have anything to do with the reservation in this decree allowing the defendants a new trial of this action at any time in the future. We are either entitled to an injunction in this case or are not entitled to it, and if we were not entitled to an injunction then there was no necessity for this provision. On the other hand, if we are entitled to the injunction, the provision is absolutely unauthorized in law and unheard of in judicial proceedings, and it would only cloud this issue to bring up an immense record containing conflicting evidence upon which the court based its conclusion; but if for any reason we are wrong in this, and if the evidence can be of any avail to the court on this appeal, then the court should have ordered the evidence to be brought up, and should still do so, and when brought up and considered by the court, it will certainly fully justify the court in granting us the injunction which this court has held should have been granted in the Eastern Oregon case.

Statement of Oregon Law.

The decision of the court in this case, it also seems to us, is either very uncertain or contrary to the decisions of the Supreme Court of the State of Oregon, and of this court in regard to the rights of riparian owners in the State of Oregon. The court says in its opinion:

> "The laws of the State of Oregon in force at the time of the decree appealed from recognizing the rights of riparian proprietors to a limited extent only, and providing for the right of appropriation of water of the non-navigable streams of the state for beneficial uses, we are of opinion that the decree here in question should be reversed and the cause remanded for further proceedings in accordance with those laws."

The court then goes on to elaborately refer to the statute of Oregon providing for the appropriation of water and the determination of water rights, and without any further comment reverses the case in the manner above stated.

The rights of riparian owners have existed in Oregon ever since the admission of that state to the Union, and the extent of them has been determined by the Supreme Court of Oregon, and even this court, on the same day that this decision was rendered, rendered an opinion to the effect that the riparian owner was entitled to the entire natural and artificial benefit of a river, and could enjoin the diversion of the water therefrom. Those rights are just as much vested rights as any other right of property, and the legislature of the State of Oregon has no more power to provide for the

"appropriation" of the same than it has to provide for the "appropriation" of any other private property. Whatever those rights are, they are fixed and vested, and they are just the same before as they were after the passage of the act of 1909. In fact that act expressly provides that it shall not in any way impair any vested right, and it is well settled by innumerable cases that the mere fact that the state has provided some new tribunal or some new procedure for the determination of rights can in no way affect the jurisdiction of the federal courts to determine those rights in cases coming within the jurisdiction of the federal courts. In fact, every state we believe that has riparian rights also has a statute regulating appropriations. There is such a statute in California, for the legislature has taken notice that notwithstanding riparian rights there are many appropriations, and these statutes simply regulate the rights of appropriators as between themselves. They can not in any way affect the vested rights of riparian owners.

These are extremely important matters, and are much more far reaching even than this present case, and if the court is going to hold that the legislature of a state by simply providing for the "appropriation" of something which has been judicially determined to be held in private ownership, that should be done in a case where the matter is properly presented and argued to the court. Certainly in this case there was no necessity for such argument. The trial court recognized our riparian rights and protected them by the injunction to which we were entitled. The defendant has not attacked

the propriety of the decision of the trial court, and the only question involved in this case is the right of the court to permit the re-opening of the case at some future time. That question, therefore, and that alone, should be passed upon on this appeal.

CONCLUSION.

The limited time allowed for the preparation of petitions for rehearing has been insufficient to enable us to properly argue the important points which are raised, and, it seems to us, raised for the first time in this case by the opinion herein, but it appears to us that without further argument, and irrespective of what final determination may be made of this appeal, a rehearing should be granted herein for the following reasons:

1. The court has been misled in its assumption that it had been stipulated that the testimony of Mr. Hanley in the Hanley case could be considered on this appeal, or that it should be deemed part of the record herein, and in assuming that the same was a part of the record in the case.

2. The court has overthrown the finding supported by the evidence that all the water was necessary for the irrigation of our lands, and that we would be injured by its diversion by some loose testimony in the Hanley case which is not part of the record in this case in this court, and which the trial court held was entirely overcome by the other evidence in the case.

3. The judgment of this court is improper in that it reverses and sets at large the judgment granting an

injunction in this case, which has never been appealed from and which is therefore beyond the jurisdiction of this court to interfere with.

4. The judgment of this court is improper in that it requires parties to be brought into the case who are not necessary to a determination thereof, when the only parties who could be injured by their absence do not ask that they be brought in, nor did they file any plea to their non-joinder or appeal from the judgment against them. Moreover, there is no procedure known to the federal court by which the parties interested in the waters of this stream could be brought into the case by the complainant, and it is not to be assumed that the defendants will bring them in even if they could do so.

5. Every rule of public policy requires that there be an end to litigation, and when a matter has been tried and adjudged that adjudication should be the end of the controversy, and we believe that it is an unheard of proposition for a court to reverse a judgment not appealed from on the ground of non-joinder of parties at most only proper and not necessary where their non-joinder has in no way been relied upon by the adverse party.

We respectfully submit that the rehearing should be granted in order that these matters may be properly presented to the court.

Respectfully submitted,

Edward F. Treadwell,

Wirt Minor,

Solicitors for Appellant and Petitioner.

I hereby certify that the foregoing petition for rehearing is in my judgment well founded, and that it is not interposed for delay.

EDWARD F. TREADWELL,
Solicitor for Appellant and Petitioner.